

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

John E. and Ruth Fitzgerald,  
Claimants

90-00522

Merrill Lynch, Pierce Fenner & Smith Inc., and  
William M. Elsbury  
Respondents

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CASE SUMMARY

In a claim filed with the NASD on or about February 20, 1990 John E. Fitzgerald and Ruth Fitzgerald ("Claimants") alleged that William Elsbury ("Elsbury") and Merrill Lynch, Pierce, Fenner & Smith, Inc. ("ML,P,F&S") (collectively as "Respondents") made material misrepresentations or omitted to state material facts relating to sales charges and the fluctuation of the net asset value to induce them to open an account with ML,P,F&S and invest in ML Retirement Income Fund. Claimants further alleged that Elsbury failed to explain the risks associated with a margin account in connection with their CMA account at ML,P,F&S.

In their joint answer filed with the NASD on or about April 17, 1990, Respondents stated that Claimants did not inform them that they intended to purchase a home within one year. Respondents stated that Elsbury fully discussed different types of investments and discussed the sales charges and risks associated with their investment. Respondents further stated that the features of margin were fully explained to Claimants. Respondents also asserted the following affirmative defenses: the claim failed to state a cause of action upon which relief may be granted; estoppel; failure to mitigate; and assumption of risk.

RELIEF REQUESTED

Claimants requested an award of at least \$10,000.00.

Respondents requested that the Statement of Claim be dismissed.

### AWARD

On Thursday September 20, 1990 in Scottsdale, Arizona during a hearing lasting a total of one (1) session, the undersigned arbitrator heard the controversy between the parties as set forth in submissions to arbitration signed on February 16, 1990 by Claimants John E. Fitzgerald and Ruth Fitzgerald on April 17, 1990 By Christopher D. Cavuoti on behalf of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on March 29, 1990 by Respondent William Elsbury.

The parties have agreed to the procedure which allows the arbitrator to execute a handwritten copy of this award and to receive a typed conformed copy of this award.

The arbitrator, having considered the pleadings, the testimony, and the evidence presented at the hearing, has decided in full and final resolution of the issues submitted for determination as follows:

1. The Statement of Claim shall be and hereby is denied in its entirety;
2. Each party shall bear its own costs and expenses incurred in this matter not specifically enumerated herein; and
3. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the filing fee in the amount of \$200.00 previously deposited with the NASD by the Claimants John E. Fitzgerald and Ruth Fitzgerald.

September 20, 1990

S/ Warren C. Kotzman  
Warren C. Kotzmann, Esq.